APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

BILLY J. McCOMBS, *ET AL.*, RESPONDENTS

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

BILLY J. McCOMBS, *ET AL.*, RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED JULY 3 AND AUGUST 14, 1978
CERTIORARI GRANTED OCTOBER 10, 1978

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*A number of the items appropriate for inclusion in the Appendix in this case have already been printed and submitted to the Court in the Appendix to Petition for Certiorari in No. 78–17, United Gas Pipe Line Co. v. Billy J. McCombs, *et al.* An asterisk following the page numbers under the column "Appendix pagination" in this Table of Contents denotes that the item appears at the pages designated in the Appendix to Petition for Certiorari.

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United States Court of Appeals for the Tenth Circuit

No. 75–1829

BILLY J. McCOMBS, R. JAMES STILLINGS, D/B/A GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY AND BILL FORNEY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, FORMERLY KNOWN AS FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

RELEVANT DOCKET ENTRIES

Order staying effect of ordering paragraph (A) of FPC Opinion No. 740 as modified by FPC Opinion No. 740–A, granting intervention and establishing briefing schedule	December 9, 1975
Initial opinion	October 18, 1976
Order granting rehearing	May 2, 1977
Order vacating prior opinion and withdrawing judgment	October 18, 1977
Opinion on rehearing	February 9, 1978
Judgment on rehearing	February 9, 1978
Order denying rehearing	April 6, 1978, as of April 4, 1978

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CP74–94

UNITED GAS PIPE LINE COMPANY, COMPLAINANT,

v.

BILLY J. MCCOMBS, R. JAMES STILLINGS, D/B/A GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, LOUIS H. HARING, JR., NATIONAL EXPLORATION COMPANY, E. I. DU PONT DE NEMOURS & COMPANY AND BILL FORNEY, RESPONDENTS.

Initial Decision on Section 7 Show Cause Order

(Issued April 26, 1974)

INTRODUCTION

LEVY, Presiding Administrative Law Judge: On October 9, 1973, United Gas Pipe Line Company (United) filed a complaint with the Federal Power Commission (Commission) alleging that the Respondents, Billy J. McCombs, R. James Stillings, d/b/a Gastill Company, David A. Onsguard, Bill Forney,[1]

[1] Bill Forney was joined as a party Respondent by Commission order issued March 5, 1974. He is operator for, and a member of, the McCombs Group.

Basin Petroleum Corporation (McCombs Group), Louis H. Haring, Jr. (Haring), National Exploration Company (NEC) and E. I. du Pont d'Neumours and Company (duPont) had failed to comply with the requirements of Section 7 of the Natural Gas Act and refused to comply with the terms of a certificate of public convenience and necessity issued in FPC Docket No. G–12694, authorizing the sale of natural gas from certain lands and leaseholds in Goliad and Karnes Counties, Texas. United alleged that it has the right to purchase natural gas produced from wells drilled on this acreage in accordance with the above certificate and pursuant to a contract dated April 29, 1953, as amended February 7, 1961, and that defendants were violating the Natural Gas Act by selling such gas to others and refusing to sell the gas to United. United also alleged that it is presently curtailing nearly 430 million Mcf of natural gas annually, or more than twenty-seven percent of its firm requirements and is suffering irreparable injury as a result of defendants' refusal to sell United the gas in question. Accordingly, United requested the Commission to issue an order requiring the defendants to show cause why they are not in compliance with the Natural Gas Act, to cease and desist the alleged unlawful deliveries, to deliver all gas produced from the subject acreage in the future and to deliver to United volumes equivalent to those allegedly unlawfully withheld from the interstate market.

The Commission issued a Notice of Complaint on October 18, 1973, inviting any party desiring to be heard in the proceedings to file a petition to intervene or protest with the FPC by November 12, 1973.

Prior to the commencement of this proceeding before the Commission, Billy J. McCombs, *et al.*, brought suit as plaintiffs in the District Court of Karnes County, Texas against United for a declaratory judgment that the United contract is void and unenforceable and to quiet their title against the claims of United, and for money damages. United removed the action to the U.S. District Court for the Western District of Texas, and has answered the McCombs Group complaint in that court. The McCombs Group alleged that the lease in question is free and clear of the claims made by United in its complaint to the Commission and that the McCombs Group entered into a contract with duPont to sell gas from the subject acreage free and clear of any rights of United under the United contract.

On November 27, 1973, the Commission issued a show cause order setting the matter for public hearing to commence January 10, 1974. The Respondents in the proceedings before the Commission were ordered to show cause why they should not be held in violation of Section 7 of the Natural Gas Act; why they should not be required to file applications for certificates of public convenience and necessity as successors in interest; why they should not be required to deliver to United in compliance with the contract provisions volumes equivalent to those withheld from the interstate market; and why they should not be required to cease the sale currently being made to the intrastate market.

The Commission's November 27, 1973, show cause order was issued prior to Respondents' answers to the October 9, 1973, complaint filed by United. In their responses, McCombs, Haring, and NEC moved

the Commission to dismiss or defer action on United's complaint pending resolution of the Texas lawsuit filed by McCombs. By order issued December 12, 1973, the Commission refused to dismiss or defer action because of the Texas lawsuit noting:

> "From an early date, this Commission has taken the view that there is a continuing obligation to perform 'service' imposed by the Act separate and apart from any contractual requirements. This distinction between the concept of underlying 'service' to the public and the contractual means by which it is implemented is quite important to a proper understanding of primary jurisdiction. Under Section 7(b), the finding that the 'public convenience and necessity' does not permit abandonment is alone sufficient to require a continuation of service, the private contract notwithstanding. Resolution of the private contract disagreement cannot, by any means be said to be dispositive of the paramount issues of the public interest under Section 7. In fact, it is these same public interest considerations that make it incumbent upon this Commission to exercise its primary jurisdiction, as delegated to it by the Act, in order to secure an initial administrative judgment of whether or not service should continue pursuant to a certificate of public convenience and necessity, as issued and outstanding." (Footnotes omitted).

Hearings were held on January 10, February 13 and 14, 1974, and briefing concluded on April 4, 1974. By order issued March 13, 1974, the Commission provided for an expedited initial decision on or before May 7, 1974, and limited the time for filing exceptions.

THE FACTUAL BACKGROUND

On April 29, 1953, United entered into a Gas Purchase Contract with Mrs. Bee Quin, Individually and as Independent Executrix of the Estate of W. R. Quin, for the sale and purchase of gas produced from certain acreage in Goliad and Karnes Counties, Texas. Article I of this contract provided that United, as Buyer, was entitled to purchase "merchantable natural gas in the quantities hereinafter set forth, produced from all wells now or hereafter drilled during the term of this contract on the lands and leaseholds" covered thereby. The original term of the contract was for ten years from the date of first deliveries. By amendment dated February 7, 1961 (Exh. 1, p. 78), the term of the contract was extended until 1981. Article I further provided that United would be entitled to receive its "proportionate share of all merchantable natural gas produced from any well or wells located on any unit or units which include any part of said lands and leaseholds" covered by the contract. Included in the dedication under the 1953 contract is a lease covering 163 acres in Karnes County, Texas, dated May 20, 1948, executed by B. C. Butler, Sr., *et al.*, as Lessor, to and in favor of W. R. Quin, as Lessee, which is known as the Butler B lease (Exh. 1, p. 23).

Following the *Phillips* decision (*Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954)), Mrs. Quin applied to the Commission for certificates of public convenience and necessity authorizing and requiring the sale and delivery to United of the natural gas covered by the 1953 contract. By orders issued December 8, 1954, and December 14, 1954, in Docket Nos.

G–2997 and G–2998, the Commission issued Mrs. Quin the requested certificates.

United installed a gathering facility and an above-ground field measuring station on the Butler B lease and received natural gas for its interstate pipeline system pursuant to the certificates issued to Mrs. Quin. United continued to receive natural gas from this acreage until some time in 1966. During this period, Mrs. Quin transferred her interest in the 1953 contract to San Andres Production Company, *et al.*, which, by order dated June 19, 1963, received a successor certificate from the Commission through its operator, H. A. Pagenkopf, Trustee, officially terminating the certificates issued in Docket Nos. G–2997 and G–2998, and authorizing and requiring, in Docket No. G–12694, that H. A. Pagenkopf, Trustee, continue the service to United initiated by Mrs. Quin.

By assignment dated April 5, 1966, and effective March 1, 1966, Haring acquired the rights granted under the Butler B lease from H. A. Pagenkopf and San Andres Production Company. By letter dated May 9, 1966, Haring informed United that he would make the appropriate filings with the Commission reflecting the change in ownership (Ex. 2). No filings were made to effect this succession in interest.

In response to a letter by United (Exh. 29), the operator for Haring, Bay Rock Corporation, wrote that the existing gas wells were depleted and that no other gas would be available at that time (Exh. 3). By letter dated December 7, 1966, United informed Bay Rock that United intended to remove its measuring facilities so that they might be used elsewhere on United's system. United stated, however, that measuring equipment would be reinstalled "if, at some future date, you have further gas to deliver to us at

the above delivery point, which will be subject to the terms of the above-captioned contract" (Exh. 4). Haring did not secure Commission permission to abandon the certificate authorizing and requiring the sale of gas from the Butler B lease to United.

In 1971 and 1972, Haring transferred his working interest rights in certain deep reservoirs in the acreage to NEC and McCombs. Under assignments from Haring, the McCombs Group acquired the working interest in 113[1] acres of the 163 acre Butler B tract as between the interval from 6,500 feet to 8,653 feet, and between 8,640 feet and 8,700 feet, and in the entire 163 acres between 8,700 and 9,700 feet all measured from the surface ground. These working interests have been unitized with the McCombs Group interest in the adjacent Butler A tract. Unit 1 comprises 263 acres of which the Butler B acreage represents 42.97%. Unit 2 comprises 313 acres of which the Butler B acreage represents 52.08%.

Upon completion of its original well in 1971, the McCombs Group contacted representatives of United in an effort to market the gas. United expressed interest and asked that information be supplied as to the manner in which the leases from which gas was to be purchased had been secured. While the record evidence is in conflict as to the details of these negotiations, they were ultimately discontinued. In June 1972, McCombs contracted with duPont to sell the gas from this acreage to the intrastate market for industrial consumption (Exh. 35).

In January 1973, United was notified by representatives of NEC that they believed the company's

[1] The remaining 50 acres were assigned to NEC under a November 1, 1971, agreement.

working interest in 50 acres of the Butler B tract might be subject to United's 1953 contract, as amended. NEC had acquired working interest rights to 50 acres of the Butler B tract between approximately 4,115 feet and 8,700 feet under an assignment dated November 1, 1971 (Exh. 9) without knowledge of United's possible interest. NEC estimated its original recoverable reserves attributable to the Butler B acreage at 3,989 MMcf. NEC also has substantial production in adjacent acreage within the McCaskill Field, 352 acres of which have been unitized with the Butler B 50 acres and from which it has sold gas. NEC entered into a contract for temporary emergency sales of gas to United from the McCaskill Field on May 14, 1973, (Exh. 13) pursuant to Order No. 418. A subsequent agreement, dated October 9, 1973, (Exh. 14) was negotiated providing for the purchase by United of gas from NEC under Order No. 491–B for a period of 180 days.

POSITION OF THE PARTIES

United and Staff take the position that the 1953 gas purchase contract dedicated the gas produced from or attributable to the Butler B lease to the interstate market through the term of the contract which, as amended in 1961, expires in 1981 (Exh. 1, p. 87). Once certificated, abandonment of such service was never authorized by the Commission. Consequently, Respondents are in violation of the Natural Gas Act by reason of their failure and refusal to deliver the gas to United and should be required to file applications and deliver such volumes now and for the remaining term of the contract, as amended, including repayment for volumes allegedly unlawfully diverted.

The Respondents reply that the Commission lacks jurisdiction, that the service initially certificated under the 1953 contract and dedicated to the interstate market was limited to the sale of gas from four producing oil wells that were depleted and abandoned, *de facto,* by 1966, that undiscovered reserves in the Butler B tract were not included and were not dedicated to interstate commerce or covered by the 1953 contract whose validity, in any event, is the subject of litigation in the Federal District Court for the Western District of Texas. Moreover, United has waived its rights by its failure to make any claim prior to 1973. And finally, the Commission has no power to order the delivery of volumes previously sold and should defer to a judicial determination of the rights and claims of the parties under the 1953 contract.

DISCUSSION

1. The McCombs Group brief asserts the Commission lacks jurisdiction to determine the contractual claims of the parties to the production involved, a question of state contract law, or to consider a complaint filed by United under Section 13 of the Act which refers to complaints by "any state, municipality, or State Commission". Section 13 does not provide the sole and exclusive method for filing complaints. The Commission, under its Section 16 rulemaking authority has provided in Section 1.6 of its Rules of Practice and Procedure that "Any person . . . may file a complaint". Moreover, the Commission may proceed *sua sponte* to discharge its statutory responsibilities under the Natural Gas Act.

This show cause order is not based on the Commission's jurisdiction to determine "the private contract disagreement" between the parties. The obliga-

tion to continue service under Section 7 of the Act exists separate and apart from any contractual obligation. Resolution of the rights of the parties *inter se* can be determined in the pending Texas law suit. The show cause order is bottomed on the Commission's primary jurisdiction under Section 14(a) of the Act to determine whether the service obligations imposed under Section 7 of the Act by the issuance of outstanding certificates of public convenience and necessity are being violated, and if so, what remedies are appropriate.

2. The central issue is the nature and extent of the service authorized, and the gas supply dedicated by the certificates involved herein and imposed by Section 7 of the Act. The McCombs Group brief maintains that the obligated service under outstandinig certificates is limited to "actual deliveries made in interstate commerce", that not "a single Mcf of gas produced from the Butler B Lease was ever delivered to United", and that, in any event the "service" imposed must be limited to the producing wells or the formation in which the wells drilled are found (Init. Br. p. 10). NEC agrees that the service authorized by the certificates issued herein was limited to service from four oil wells and did not include "any and all wells on the acreage identified in the contracts" (Rep. Br. p. 2).

Section 7(b) of the Act provides in substance that no service subject to Commission jurisdiction rendered by a natural gas company may be abandoned without Commission authorization. The "service" required under the Act upon certification is not limited to the service actually being performed by the producer but extends to the service proposed, including the supply of gas dedicated to interstate use, which the producer has undertaken to perform in applying for certification and which the Commission has relied upon in evaluating whether the proposed service and gas supply meet the public convenience and necessity requirements of the Act. The original applications in Docket Nos. G–2997 and G–2998 proposed service under the 1953 contract, as amended, attached thereto as Exhibit C, which covered the continuing sale to United of gas produced from the dedicated acreage including the Butler B lease. The service which Mrs. Quin agreed to perform was not restricted to any particular well or reservoir. The fact that production and sale were then limited to gas from producing oil wells does not limit the service dedication to such operating oil wells. That dedication covered the sale of all gas produced during the term of the 1953 contract, as amended, "in the acreage owned and controlled by Applicant in the South Porter Gas Field, in Karnes County, Texas . . ." including the Butler B tract. The service dedication of this acreage was continued in the successor application [1] originally filed by Hawn Brothers on

[1] That application states in part:

"Applicant and other co-owners who are specifically set out below, have acquired (subject to production payments) the interest formerly owned by Bee Quin in various oil and gas leases covering land situated in the South Porter Field of Karnes and Goliad Counties, Texas. The interest so acquired by Applicant and the other co-owners is subject to that certain Gas Sales Contract dated April 29, 1953, and amendments thereto dated August 12, 1954; August 31, 1954; and, September 7, 1954, under the terms of which gas is sold to United Gas Pipe Line Company. With respect to sales under the subject contract, Bee Quin was by order issued by the Commission on December 8, 1954, in Docket No. G–2998, granted a certificate of public convenience and necessity, pursuant to an application therefore filed by Bee Quin. The subject Gas Sales Contract was filed with the Commission by Bee Quin as her rate schedule and is designated Mrs. Bee Quin FPC Gas Rate Schedule No. 1 and supplements thereto."

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June 3, 1957, and issued to H. A. Pagenkopf on June 19, 1963, in Docket No. G–12694. In point of fact, gas deliveries from the certificated acreage to United continued up to 1966, and included gas from wells drilled subsequent to the issuance of the original certificates (Tr. 46, 206). New certificates for each new well were neither required nor sought (Exh. 2, Exh. 1, p. 60). As noted in *Cumberland Natural Gas Company,* 34 FPC 132, 136–137 (1965):

> "The principle is well established that dedication of reserves for sale in interstate commerce occurs at least as soon as deliveries commence, and that once such service is begun, the producer cannot terminate the service without Commission approval. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 387–389 (1959); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 156 (1960). It is thus plain that in this instance Miller assumed the continuing duty to deliver for sale in interstate commerce the gas from its 9,000 dedicated acres until it exhausted its reserves or received Commission permission to cease service.
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> Moreover, Miller's interest in these 80.5 acres was effectively dedicated irrespective of the fact that at the time of dedication the gas reserves in such acreage may have been unproven, and were never connected to the Cumberland's facilities."

3. The facts show that the existing wells were depleted by the end of 1966 and United subsequently withdrew its measuring facilities. However, under Section 7(b) of the Act, a service once commenced and a gas supply once dedicated cannot be abandoned or withdrawn from jurisdictional service without Commission approval.[1] Respondents argue that the Commission should do now what should have been done in 1966, and authorize abandonment *nunc pro tunc.* There is no assurance that abandonment, if applied for in 1966, would have been granted or even unopposed. In any event, it is now clear that the deeper reserves underlying the Butler B tract were not depleted (there was no evidence either way in 1966). Those deeper reserves were also dedicated to interstate commerce under the original certificates. Consequently, it would not be in the public interest during the present emergency[2] to authorize abandonment with the resulting loss of this vital and critical gas supply now needed by jurisdictional customers whose current requirements are being curtailed.

CONCLUSION

I have concluded that the service authorized and the gas supply dedicated by the certificates involved herein include any and all gas produced from the Butler B acreage. Consequently, the continuing unauthorized intrastate sale of this gas supply constitutes a violation of the Natural Gas Act and Respondents, as successors-in-interest to the original certificate holders, are required to file applications for certificates of public convenience and necessity under Section 7 of the Act. (*Graridge Corp.,* 30 FPC 1156, 1162[3] (1963).

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[1] *Atlantic Refining Co.* v. *P.S.C.* (*Catco*), 360 U.S. 378, (1959).

[2] United has projected 1974–75 curtailments of 36 to 39% of customer requirements.

[3] "Each successor, by stepping into the shoes of his predecessor, takes the properties and sales subject to any benefits or infirmities inherent therein."

The rights of the parties *inter se* and the appropriate remedies at this juncture, however, are another kettle of fish or, more appropriately, a can of worms. The Commission's show cause order of December 12, 1973, (cited *supra*) agrees that Respondents' service obligations under the Act are "separate and apart from any contractual requirements" or "Resolution of the private contract disagreement". The rights of the parties *inter se* and whether Respondents are *contractually* bound to deliver gas to United can best be determined in the litigation now pending in the U.S. District Court for the Western District of Texas (cited *supra*). That is the appropriate forum to determine the validity of the 1953 contract as, amended, the various contractual defenses asserted by Respondents including laches, waiver, estoppel, discharge, novation, accord and satisfaction and alleged violations of the antitrust laws.

Clearly, in this proceeding Respondents, however innocent of intentional violations and however negligent United may have been in asserting its rights should be required to cease and desist from continuing current, illegal, intrastate sales of the Butler B acreage gas supply and to file forthwith for authority under Section 7 of the Act to make approved sales. United and Staff argue for delivery to United now of all the volumes attributable to the Butler B lease including repayment for volumes unlawfully diverted.

Unfortunately, the record in this proceeding is inadequate for the determination of such diverted volumes and for defining the terms and conditions, including price, of past, present, and future sales. This determination can best be made following Respondents' filing of applications for certificates of

public convenience and necessity, as ordered herein, covering their sales of Butler B tract gas as successors-in-interest and the making of an adequate record for this purpose, assuming the matter is not resolved in pending settlement negotiations.[1] For example, NEC maintains that United has, in fact, received or soon will receive the equivalent of all volumes attributable to NEC's share of the Butler B tract. Through January 1974, 3 Bcf were produced from the Butler B tract compared to total deliveries to United by NEC of 3.5 Bcf[2] (see p. 8 of NEC Init. Br.). United apparently disagrees and also rejects the 2.3 Bcf estimate offered by the McCombs Group. The difficulty of identifying aggregate production from the Butler B tract is further complicated by pooling and unitization with other acreage and the complex nature of the gathering systems (Exh. 17, 27, 36).

The record is clear that NEC has acted at all times in good faith and in apparent compliance with Section 7 of the Act.[3] United's claim to production from the Butler B tract was not known or asserted when NEC began drilling in 1972. In fact, United's possible interest was brought to its attention by NEC in January 1973 (Tr. 140, 141, 163, 190). What effect should the Commission give to volumes delivered by NEC[4] under outstanding certificates while United was sleeping on

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[1] See footnote 46 on page 17 of United's Reply Brief.

[2] NEC's estimate of recoverable reserves underlying its 50 acres of the Butler B tract is 3,989 MMcf (Rep. Br. p. 9).

[3] The history of NEC's efforts is set forth in its Initial Brief, p. 6, *et seq.*

[4] See Commission Opinion No. 678 and Tr. 102, 150, 168–171.

its rights? United and NEC entered into a series of purchase gas contracts beginning on April 21, 1972, (Exh. 11–14). The effect of these agreements and authorized deliveries will have to be considered in determining NEC's current delivery obligations, if any, to United.

Similarly, the remedies available in respect of the McCombs Group should await their successor-in-interest filing as required in this proceeding. Staff urges that Respondents repay to United the volumes of gas unlawfully diverted but does not suggest how such an order should be quantified or implemented on the record in this proceeding. The McCombs Group, like NEC, asserts it acted without notice of United's claims and in good faith, and disputes the Commission's power to order make-up deliveries from uncommitted reserves outside the Butler B acreage or to assert jurisdiction over du-Pont under the Natural Gas Act. Accordingly, all questions relating to the appropriate remedies will be reserved for resolution after Respondents have filed applications for new certificates covering sales from Butler B acreage as required herein.

MOTIONS

By motion dated April 2, 1974, the McCombs Group requested that I exclude from consideration copies of applications for public convenience and necessity in Docket Nos. G–2997 and G–2998, supplied by United as Appendices A and B to its reply brief. The motion is denied. These copies were supplied for the record after it became apparent that these applications were no longer available in the Commission's files. The McCombs Group does not challenge the accuracy or

authenticity of the copies, duplicate originals of which are contained in United's files, which were sent to all parties by letter dated March 19, 1974 (United's Response dated April 6, 1974). The copies are received in evidence as relevant and material. The McCombs Group has commented fully on this material in its briefs.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the evidence and the briefs filed, the Presiding Judge finds and concludes, in addition to the findings and conclusions above stated, as follows:

(1) The certificate issued in Docket No. G–12694, and the service initially dedicated thereunder, requires the delivery and sale in interstate commerce of all gas produced from the Butler B lease.

(2) Respondents are violating Section 7 of the Natural Gas Act as implemented by the regulations issued thereunder in that they are and have been making unauthorized sales of such gas without the approval of the Commission.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or upon its own motion, as provided in the Commission's Rules of Practice and Procedure, that Respondents be and are hereby ordered:

(1) To file, pursuant to Section 154.92(d) of the Commission's Regulations, as successors-in-interest to the dedicated acreage and the service previously au-

thorized in Docket No. G–12694, and for such other authorization as may be necessary to comply with Section 7 of the Act and the Commission's Regulations issued thereunder; and

(2) To cease and desist the sales currently being made to the intrastate market of gas produced from the Butler B lease.

WILLIAM C. LEVY,
Presiding Administrative Law Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75–1829

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORP., E. I. DU PONT DE NEMOURS & COMPANY AND BILL FORNEY, PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
UNITED GAS PIPE LINE COMPANY, INTERVENOR.

November Term—December 9, 1975

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

ORDER

This matter comes on for consideration of the motion for stay filed by the McCombs Group and DuPont together with the motion of United Gas Pipe Line Company for leave to intervene in the captioned appeal. The Court has received and examined the responses by the Commission and industry groups.

Upon consideration whereof, it is the ORDER of the Court as follows:

1. The Court Orders a stay of the effect of ordering paragraph (A) of Opinion No. 740, as modified by Order No. 740–A and any modifications thereof pending appeal and until further Order of this Court; and

2. It is the further Order of the Court that United

Gas Pipe Line Company is granted leave to intervene in the captioned cause.

The Court wishes to expedite the early submission of this matter upon the issues and, therefore, specifies that the following record and briefing schedule shall be met:

1. The record on appeal shall be filed not later than the date required by the Rules; i.e., December 24, 1975.

2. The Petitioners shall file their briefs on or before January 14, 1976. The Respondents shall file their brief on or before February 4, 1976. Reply briefs, if any, shall be filed on or before February 14, 1976. There shall be no extensions of time granted except by express Order of the Court.

The case shall be calendared for hearing during the February Term of Court commencing February 23, 1976.

HOWARD K. PHILLIPS, *Clerk.*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1829

BILLY J. McCOMBS, R. JAMES STILLINGS, d/b/a GASTILL COMPANY, DAVID A. ONSGARD, BASIN PETROLEUM CORPORATION, E. I. DU PONT DE NEMOURS & COMPANY, and BILL FORNEY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, formerly known as FEDERAL POWER COMMISSION,

Respondent,

UNITED GAS PIPE LINE COMPANY,

Intervenor.

Opinion on Rehearing on Petition for Review of Orders of the Federal Power Commission

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(February 9, 1978)

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge: These proceedings come before us for rehearing involving a review of opinions rendered by the Federal Power Commission (FPC) finding that the petitioners (McCombs Group) had violated two sections of the Natural Gas Act, 15 U.S.C. §§ 717f(b) and 717f(f) by failing to deliver natural gas to United Gas Pipe Line Company (United) under a producer's certificate authorizing the sale and continued sale of gas in interstate commerce. The pivotal dispute is whether the certificate was in force and effect or whether it had been abandoned prior to these proceedings. The FPC found that there had been no aban-

donment. In *McCombs* v. *Federal Power Commission*, 542 F.2d 1144 (10th Cir. 1976), authored by Judge Seth, the orders of the Commission involved here were set aside. However, this court granted the Commission's petition for rehearing. Thereafter, on October 18, 1977, this court directed and ordered that the opinion and judgment of October 18, 1976, *supra*, be withdrawn and vacated. We will refer to and quote from the prior opinion which has been vacated and withdrawn, however, inasmuch as it is reported in 542 F.2d 1144, *supra*.

In 1953, the leaseholders-producers of the Butler B lease covering a 163 acre tract situate in Karnes County, Texas, entered into a Gas Purchase Contract with United whereby the producers agreed to sell to United all natural gas produced then or thereafter from the tract. The producers applied to the FPC for producer certificates which were granted on December 8, 1954, authorizing the sale of the natural gas in interstate commerce.

The Butler B lease was assigned on various occasions prior to June 19, 1963, when the FPC terminated the 1954 certificates and issued a new certificate authorizing one H. A. Pagenkopf, then the Butler B lease assignee, to continue the service. This operator assigned the Butler B lease to one Louis H. Haring (Haring), et al., effective March 1, 1966. Haring appointed Bay Rock Corporation (Bay Rock) to operate the properties. At that time one well only had been completed on Butler B at a depth of 2,900 feet. It was not then producing. Haring-Bay Rock attempted to re-establish production from this well but those efforts failed for the most part and all production from the well and the lease terminated on May 28, 1966.

On December 5, 1966, Haring and Bay Rock informed United that production had ceased, that the gas reserve was depleted from the well and that there was no gas available for sale at that time. No deliveries of gas had been made to United since September 16, 1966. Following the notification that gas from the well was depleted, United

wrote Bay Rock that it planned to remove its measuring station which had been used to measure gas delivered to it from the well on the Butler B lease but that if, at some future date, further gas should become available from the properties subject to the 1953 contract, United should be informed so that it could arrange to reinstall the measuring equipment. United then removed the measuring equipment. Haring testified that he then considered the 1953 contract terminated.

Haring thereafter assigned his working interest rights, as successor lessee, to certain sands or reservoirs between depths of 8,700 to 9,700 feet. By means of unitization, the McCombs Group (Group) acquired the right to drill into these deeper depths involving the Butler B lease and an adjoining tract known as the Butler A lease, consisting of some 150 acres. Thereafter, the Group drilled and completed four producing gas wells from the deeper depths. One other company, National Exploration Company (National) which had previously acquired the Haring working interests in the west 50 acres of the Butler B lease covering depths of 4,115 feet to 8,700 feet had completed two producing gas wells. United contacted National in April of 1972 relative to purchasing the gas from these two wells. National then first became aware, in examining title documents in anticipation of sale of the gas, of United's 1953 purchase contract. National informed United that the gas from its two wells may be subject to United's 1953 Gas Purchase Contract. It was then that United undertook a title search concerning the Butler B tract. In May, 1973, United learned of its interest under the 1953 contract.

Haring did not at any time inform the Group of United's 1953 Gas Purchase Contract. He considered that contract terminated when production ceased from the single producing well on May 26, 1966. When he transferred his working interest rights to the deeper horizons in the Butler B lease to the Group, Haring did not believe that United had any further right or claim to gas which may be there-

after produced from the lease. The Group, before drilling, relied upon a 1967 title opinion which did not reflect any interest which United might have in the Butler B tract. After the Group realized production from its first well drilled on the Butler A tract in 1971, it contacted United, together with other prospective gas purchasers, relative to negotiations for sale of the gas. United wrote the Group on November 19, 1971, inquiring with regard to how the Group had acquired its interests in the leases. There is nothing in the record which casts any light on the negotiations. However, the Group did obtain a new title opinion on December 7, 1971, which for the first time disclosed to the Group United's 1953 Purchase Contract relating to the Butler B lease. Thereafter, in February, 1972, the Group discovered commercial gas from another well drilled on the Butler A tract. A title opinion of May 31, 1972, did not disclose any interest of United therein. In June of 1972, the Group concluded successful negotiations whereby it agreed to sell all of the gas it purchased from the Butler A and B leases to E. I. duPont deNemours & Company for industrial uses in *intrastate* commerce.

The Group successfully completed two more gas wells on the unitized tracts. Thereafter, on June 6, 1973, United notified the Group that it claimed all of the gas being produced from these tracts under and by virtue of its 1953 Gas Purchase Contract. The Group thereupon initiated a declaratory judgment action in the district court of Karnes County, Texas, against United. The action was removed to federal district court. On October 9, 1973, United filed a complaint with the FPC. Our reported opinion in *McCombs v. Federal Power Commission, supra,* detailed those proceedings leading to the Commission's adoption of the administrative law judge's conclusion that "the service authorized and the gas supply dedicated [under the original certificate involved here] include any and all gas produced from the Butler B acreage" and that, consequently, the intrastate sale to duPont was violative of the Natural

Gas Act. The administrative law judge further found that however negligent United may have been in asserting its rights under the 1953 Gas Purchase Contract and however innocent the Group may have been, that, notwithstanding, the Group should be ordered to cease and desist from continuing sales to duPont.

The basic matter for our determination of this rehearing relates to the issue of abandonment. The Commission held that there can be no abandonment of a certificate authorizing interstate service absent strict compliance with the requirements of petition, notice, hearing and establishment of cause for abandonment as required under 15 U.S.C.A. § 717(b) and § 717f(b).

Additional facts relating to the matter of abandonment set forth in our reported opinion in *McCombs v. Federal Power Commission, supra,* are appropriate here:

> To consider again some of the facts outlined above as they relate to this issue, the one producing gas well on the Butler B lease ceased producing early in 1966. The lease was assigned by Pagenkopf effective in March 1966, and the assignee, Haring, attempted to work over the well. During this work, about 3,000 Mcf was produced, but all production again ended in May 1966. The operator for Haring advised the gas purchaser, United, in December 1966 that the well was depleted. United thereafter in 1966 removed the equipment it had connected to the well. Thus, the only producing gas well was abandoned in the fall of 1966. The operator and the purchaser recognized that there could be no more gas delivered from the well. This was a physical fact beyond the control of either of them, and they recognized the realities of the situation. The operator or owner had tried to restore production but was unable to do so. The sellers and buyers wished to continue the sale and purchase of gas but could not do so. The record does not show that any gas was ever pro-

duced thereafter from this original well. The witness Haring who was the owner who attempted the workover, and who was a petroleum geologist, testified:

> "Certainy I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, as far as I know, neither United nor anyone else was aware of its existence."

In August 1968, the FPC wrote a letter to Pagenkopf suggesting that he file an application for abandonment. By an undated letter the Commission made a similar suggestion to the operator for Pagenkopf's successor, Haring. The FPC thus twice recognized that there had been no production for an extended time, and recognized that the abandonment should be formalized for its records. This must be acknowledged as a recognition by the Commission that there was in fact an abandonment, but there was something needed for the record. The records of the FPC as to this matter have apparently been destroyed under its procedures; consequently, it is not known what they may have indicated as to abandonment. The Commission in Opinion No. 740 in footnote 2 states as to the original proceedings for certification: "Our records indicate that Docket Nos. G-2997 and G-2998 were destroyed in 1964." It is apparent however from the testimony that no operator or owner filed a formal application to abandon.

542 F.2d at p. 1148.

In that same opinion we further observed and held:

> Thus we have a situation where there was an abandonment as a recognition of the indisputable physical facts beyond anyone's control. The Commission participated in this recognition as there were at least two suggestions by the Commission that someone file something to tidy up the records. These letters from the Commission must be taken, in view of the destruction of the supporting records, to be an acknowledgment that there was an abandonment. It is difficult to see how a formal application, and a decision by the Commission could have added anything to these letters. In these circumstances, we must hold that there was an abandonment which was recognized by the Commission, and its jurisdiction ended.
>
> Thus we must hold as a matter of law that there was an abandonment sufficient under Section 7(b) of the Natural Gas Act. This being a matter of law, we do not consider it within the expertise of the Commission.
>
> The "abandonment" we refer to is that contemplated under Section 7(b) of the Act, as above indicated. This is the only "abandonment" which is applicable to these circumstances. Section 7(b) refers to "service rendered," and the ordering of further "service" would have been a futile gesture. The seeking of an application by the Commission was a recognition of the fact that no more gas could be delivered from the only gas well, and that the "service rendered" had long since ceased contrary to everyone's wishes. This action by the Commission thus could only have reference to Section 7(b).
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> 542 F.2d at pp. 1148, 1149.

We know of no opinion dealing with a factual situation similar to that presented here. In light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production from the Butler B leasehold on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act.

I.

FPC contends that § 7(b) of the Natural Gas Act [15 U.S.C.A. § 717f(b)] is explicit in requiring that prior Com-

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mission approval must be obtained by any natural gas company before it can abandon any "facilities," or "service" involving the transportation and resale of gas dedicated by certificate to sale in interstate commerce. The full text of § 7(b) is as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that present or future public convenience or necessity permit such abandonment.

To be sure, just as we previously recognized in *McCombs v. Federal Power Commission, supra,* the decisions are abundant and clear on the point that in those cases where the supply of natural gas is not depleted, the service must be continued via the facilities authorized. Obviously, there could be no finding by the Commission that the available supply of natural gas has been depleted under such circumstances. *United Gas Pipe Line v. Federal Power Commission,* 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1966); *Sunray Mid-Continent Oil Co. v. Federal Power Commission,* 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960); *Sun Oil Co. v. Federal Power Commission,* 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639 (1960); *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959); *Phillips Petroleum Co. v. Federal Power Commission,* 556 F.2d 466 (10th Cir. 1977); *Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co.,* 486 F.2d 315 (8th Cir. 1973); *Valley Gas Co. v. Federal Power Commission,* 159 U.S.App.D.C. 311, 487 F.2d 1182 (1973); *J. M. Huber Corp. v. Federal Power Commission,* 236 F.2d 550 (3rd Cir. 1956); *Panhandle Eastern Pipe Line*

Co. v. Michigan Consolidated Gas Co., 177 F.2d 942 (6th Cir. 1949). These decisions support the proposition advanced by this court in *Harper Oil Co. v. Federal Power Commission,* 284 F.2d 137 (10th Cir. 1960):

> It would thus seem clear that once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder so long as production continues. [Citing to *Sun Oil Co. v. F. P. C.,* 364 U.S. 170, 80 S.Ct. 1388, 4 L.Ed.2d 1639.]
>
> 284 F.2d at p. 139.

We hold that, as a matter of law, based upon the facts and circumstances of the instant case, there was an abandonment under Section 7(b) of the Natural Gas Act which does not render the issue within the expertise of the Commission. Abandonment in the context of the facts and circumstances of this case cannot be equated with a voluntary "giving up" of valuable rights and/or property in the usual sense of relinquishment or surrender. Rather, the abandonment here presents the very practical recognition that there was no *service* to be rendered following the depletion of gas on December 5, 1966, from the Butler B leasehold. All parties recognized that for a period of five years thereafter no *service* could be rendered because the known gas reserves were depleted. These *facts* were acknowledged by all of the parties, including the Commission. Thus, the only known reserves of natural gas for which applications for certification had been made and authorized had been depleted. With its depletion and the subsequent five year period of non-service, there was no need for the formality of a Section 7(b) hearing. This is so because, in our view, all parties, including the Commission, considered that there were no gas reserves available following cessation of production and the subsequent efforts to restore production by workover methods in order to *service* the

public consumer, and, of course, to profit from the discovery and sale.

At oral argument, the FPC contended that the certificate originally granted authorized and dedicated all gas without regard to depth or sand/reservoir limitations, to sale in interstate commerce and that there cannot be an "abandonment in fact." The FPC further argued that its expertise is required as a prerequisite to any abandonment in that a formal hearing may or might see the presentation of expert evidence by the Commission that further reserves of natural gas are likely to exist at other depths, zones, reservoirs, etc., underlying the subject leasehold. Nevertheless, counsel for the Commission did acknowledge that in factual instances such as those presented here, proof of depletion and efforts to resurrect production by workover attempts have been acceptable evidence of depletion of gas for purposes of abandonment orders under Section 7(b).

The Commission urges that *Mitchell Energy Corp. v. Federal Power Commission*, 533 F.2d 258 (5th Cir. 1976) controls. That opinion held that although the 1949 contract between the gas producer and gas purchaser which dedicated all gas from the seller's interest in leaseholds and units in a particular field had expired in 1973, that nevertheless the successor in interest to the original producer was bound to dedicate the gas to interstate commerce because the successor assumed, as a matter of law, the original producer's obligations. That simply is not the case before us here. There had been no cessation of production in *Mitchell* and certainly no *depletion* of known reserves. *Mitchell* is not at variance with those decisions we have heretofore cited for the proposition that once natural gas is dedicated to interstate commerce it cannot be withdrawn from service in interstate movement without prior Section 7(b) FPC approval.

Our holding that strict compliance with the non-abandonment language of 15 U.S.C.A. § 717f(b), *supra*, does not

control under the facts and circumstances here is, we believe, buttressed by certain language contained in *Union Oil Co. of California v. Federal Power Commission*, 542 F.2d 1036 (9th Cir. 1976). At issue there was the FPC requirement that all producers of natural gas dedicated to interstate commerce annually submit a Form 40 containing detailed information about their natural gas reserves. The Court rejected the FPC contention that the reporting burden on the producers was outweighed by the Commission's need to have the reservoir data. The Court stated, in pertinent part:

> There is no evidence from which the FPC could conclude that the data required on Form 40 on a by reservoir basis were or could easily become available. The only evidence is to the contrary . . . Although there was no evidence before the Commission to contradict the unanimous statements of the producers that natural gas reserve data are not kept by them on a 'by reservoir' basis and that such data would be extraordinarily expensive to obtain, the Commission majority found that '[T]here is little doubt that the information required . . . is possessed by the respondents.' . . . This assertion is simply wrong . . . The Commission's factual determination that the data required are available is not supported by any evidence, much less by substantial evidence.
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> 542 F.2d at p. 1042.

We conclude that the abandonment of the service in the instant case was accomplished, as a matter of law, when all of the parties recognized that the then known natural gas reserves were depleted in 1966 followed by failure to provide any service under the certificates for a period of five years during which time there was no evidence of other estimated gas reserves recoverable from the subject leaseholds.

We direct that all orders included in the Commission's Opinions Nos. 740, 740-A, and 740-B be set aside. We remand with directions that other pending proceedings in the Commission's Docket No. CP74-94 based on such orders be terminated and that the proceedings be dismissed.

IT IS SO ORDERED.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent. While the equities favor the McCombs Group, duPont and National, usual contract rules and equitable considerations do not control in this proceeding under the Natural Gas Act, in my opinion. Instead, there are mandatory statutory requirements on abandonment of service which were imposed to protect the public interests recognized by the Act, *Sunray Oil Co. v. FPC*, 364 U.S. 137, 143, 80 S.Ct. 1392, 4 L.Ed.2d 1623, and these provisions convince me that we should affirm the basic holding of the Commission in this case.[1]

The majority opinion reasons (p. 1380) that: there was an abandonment in fact after all production ceased in 1966 on the Butler B lease from then known productive formations, as recognized by the Commission and the parties; that with this recognized abandonment the Commission's jurisdiction ended; and that this abandonment was sufficient, as a matter of law, under § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), and this being a matter of law, it was not within the expertise of the Commission.

To me these conclusions are directly contrary to the plain terms of § 7(b). The statute could hardly be clearer in saying that:

[1] The majority opinion does not reach other issues raised such as the propriety of the ruling on dissolution of the units and of the order requiring repayment to United of quantities of gas sold to duPont in the intrastate transaction, and the failure to sustain the motion challenging jurisdiction as to duPont. Thus it is unnecessary for me to address these issues. I will consider only the holding of the majority on the central abandonment issue.

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, *without the permission and approval of the Commission first had and obtained,* after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (Emphasis added).

It is the *Commission* that must make the required findings and give approval before abandonment is legally effected, and not private parties by their agreement on the facts as to depletion and their consent to discontinuation of service. Nor does a determination by another tribunal that abandonment has occurred, as a matter of law, satisfy § 7(b). As the Supreme Court pointed out in *Sunray*, supra, 364 U.S. at 158 n.25, 80 S.Ct. at 1404:

> "It might be observed that in these cases the Commission issued certificates without time limitations. *Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7(b).* The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants. (Emphasis added).

See also *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 389, 79 S.Ct. 1246, 3 L.Ed.2d 1312; *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466, 469 (10th Cir.); *Mitchell Energy Corp. v. FPC*, 533 F.2d 258, 261 (5th Cir.).

The majority lays stress on the fact that production from the known reserves underlying the Butler lease was depleted in 1966, that there was testimony that neither United, the producer, nor anyone else was then aware of deeper reserves, and that as a practical matter there was no service that could be rendered thereafter from that lease. And, as the majority says, counsel for the Commission conceded that proof of such depletion and of failure of efforts to re-establish production has been accepted by the Commission in § 7(b) proceedings as a basis for permission for abandonment. Further the Commission did twice write suggesting that an application for abandonment be filed, which action the majority interprets as Commission recognition that there was in fact an abandonment.

However, there were other reserves as is now known, and United did state that while it would remove its metering equipment in 1966, it would reinstall such equipment whenever further gas might be delivered under the contract. (J.A. 137). In view of these circumstances it may not be quite certain what would have happened if application for a complete abandonment had been made, notice thereof had been given by publication,[2] and a final abandonment approval had been considered by the Commission. But, in any event, permission for abandonment of all service was for the Commission and we cannot make the findings and give the approval which Congress deemed it necessary for the Commission to make. *Sunray*, supra, 364 U.S. at 142, 80 S.Ct. 1392.

[2] The Commission's regulations required notice by publication and mailing to States affected by the application, see 18 CFR § 157.9 (January 1, 1969), and permitted petitions for interventions by persons desiring to participate. See 18 CFR § 157.10 (January 1, 1969). Pipeline purchasers have been permitted to intervene in such proceedings. See *e. g., Transcontinental Gas Pipe Line Corp. v. FPC*, 160 U.S.App.D.C. 1, 2-3, 488 F.2d 1325, 1326-27, cert. denied sub nom. *Natural Gas Pipeline Co. v. Transcontinental Pipe Line Corp.*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed.2d 226.

The Commission noted in its Opinion 740 that the original 1953 contract covered merchantable natural gas produced from all wells now or hereafter drilled during the 10-year term of that contract (later extended to 1981) on specified leaseholds including the Butler B tract, and further noted that there was no mention of any particular depths in that contract. (J.A. 160-61). Further, the McCombs Group now does not contest the fact of delivery of gas from the Butler B lease to United.[3] Such delivery constituted both a sale under the contract and commencement of a "service" obligation in interstate commerce under the Act. *Phillips Petroleum Co. v. FPC*, supra, 556 F.2d at 469. As this delivery was made under a contractual dedication without limits as to depths, there was a dedication to interstate commerce of the underlying reserves in question, and the effort to resell the same gas amounted to an attempted abandonment, which could not be done without first obtaining approval of the Commission under § 7(b). Ibid.

For these reasons I would sustain the Commission's conclusion that the commencement of service completed dedication to United in interstate commerce and thereby invoked the protection of § 7(b). (J.A. 163). And concluding that procedures made mandatory by the Act have not been complied with, I must dissent.

[3] The McCombs Group says that the statement by United indicating that the record shows that gas was received by United from the Butler B lease should be read with some caution. The McCombs Group points to the absence of evidence in the original record that gas was actually delivered from the Butler B lease to United, but recognizes that United later presented some evidence on the point in subsequent proceedings before the Commission. The McCombs Group states that since it is not seeking merely a remand, it has not raised the delivery of Butler B gas to United as an issue in this review proceeding, except as evidence of the Commission's partiality toward United. (Reply Brief of McCombs Group, 2).

SUPREME COURT OF THE UNITED STATES

No. 78–17

UNITED GAS PIPE LINE COMPANY, PETITIONER,

v.

BILLY J. MCCOMBS, ET AL.

Order Allowing Certiorari. Filed October 10, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 78–249 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 78–249

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER,

v.

BILLY J. MCCOMBS, ET AL.

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